A

Venu Nair & Anor v Public Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1618–10 OF 2015
IDRUS HARUN, ZALEHA YUSOF AND MARY LIM JJCA
7 MARCH 2017

C *Civil Procedure — Appeal — Appeal against decision of High Court — Respondent granted leave to execute judgment personally against partners of firm — Appeal against judgment granting leave — Partners disputed liability — Whether trial judge should have ordered issue of liability to be tried and determined before granting leave to execute — Whether issue raised in appellants' affidavits or submissions in High Court — Whether issue only raised in Court of Appeal — Whether liability of appellants as partners of firm already decided — Whether specific Act relating to partnership would prevail over any other law relating to liability of partners*

D

E

Partnership — Liability of partners — Joint and several liability — Whether appellants liable jointly and severally with errant partner and also their firm — Whether liability of partners established when firm was sued

F The appellants were partners of the legal firm of Messrs Paul Cheah & Assoc ('the firm'), while the respondent bank was a client of the firm. The respondent had granted a loan facility to a company known as Polyidaman Sdn Bhd ('Polyidaman') and had appointed the firm to be its solicitors to prepare loan security documentation for the loan. As a security for the loan, Polyidaman had G duly executed a charge under the National Land Code over its property in favour of the respondent. When Polyidaman defaulted in its loan repayments the respondent initiated legal proceedings against it. It was at that point, that the respondent discovered that the charged property had been discharged without its knowledge. A search revealed that the property had been transferred H to a third person and that the same property was now charged to CIMB Bank Bhd as a security for that third person's loan. It was also discovered that the discharge document contained a forged signature of one of the respondent's officers and was witnessed by one Frankie Tan Lyn Seang ('Frankie Tan'), who was a partner of the firm. Consequently, the respondent had commenced a suit I to claim for the damages caused by the firm's negligence, fraud and breach of contract and duty of care. After a full trial, the High Court awarded judgment in favour of the respondent. The firm's appeal was dismissed by the Court of Appeal. Subsequently, the respondent filed an application under O 77 r 5(4) of the Rules of Court 2012 ('the ROC') ('the application') to execute the

judgment personally against all the four partners of the firm instead of the firm. The application was allowed by the High Court. Hence, the present appeal by the appellants or two of the partners of the firm. In this appeal the appellants only relied on one issue ie O 77 r 5(5) of the ROC. It was the appellants' argument that in cases where the partners, such as themselves, clearly disputed their liability the trial judge should have ordered the issue of liability to be tried and determined before granting the leave to execute. The appellants further submitted that this rule should especially apply to the present case where in the main suit only the firm was sued and not the partners. In response, the respondent submitted that it was seeking to execute against the four partners of the firm as the firm had ceased operations. The respondent also claimed to rely on its verification with the Bar Council in commencing the application for leave to execute against the appellants. The appellants' defence was that they had no knowledge of and legal responsibility for the discharge and the criminal and fraudulent acts of Frankie Tan. The appellants further alluded to proceedings that the firm had initiated against its insurers to provide cover to the firm in relation to the matters complained of by the respondent. It was also the appellants' argument that although the firm was liable and that the acts of the partners would bind the firm and bind each partner, execution was only in respect of the firm's assets, and not the partners personally. The appellants further submitted that O 77 r 5(4) of the ROC required partners who were similarly circumstanced to be given leave to defend that issue of personal liability before execution could be pursued and that the trial judge had erred in law and on the facts. The respondent's basic argument was that the liability of the appellants as partners of the firm at the material time has already been clearly established under the Partnership Act 1961. Further, the respondent objected to the appellants raising this issue of O 77 r 5(5) of the ROC as this was a new issue and never raised before the High Court.

Held, dismissing the appeal with costs of RM4,000 to be paid by each appellant:

(1) **(per Zaleha Yusof JCA, majority)** Upon perusing the record of appeal it was found that it was true that the issue of O 77 r 5(5) of the ROC was never raised in the High Court. The issue that the appellants' liability had to be tried first before leave to execute the judgment was granted, was neither raised in the appellants' affidavits to oppose the application nor in their submissions. This issue that the High Court judge had erred in failing to appreciate the provision of O 77 r 5(5) was only raised for the first time in the appellants' memorandum of appeal. However, if the issue was never raised or argued before the High Court judge, how could she be said to have erred. It was trite law that like pleadings, assertions made by a party in his affidavit should bind him. Therefore, although the appellants had now raised the issue in their memorandum of appeal, it was settled law that this issue could not and should not be allowed as it

had gone beyond the four corners of their affidavits, which they were bound to. In any case, the liability of the appellants as partners of the defendant had in fact been raised and decided by the trial judge in the main suit and the trial judge in the main suit had held that the Firm was liable and that all partners of the firm, which would of course include the appellants, were also jointly liable. This decision had also been affirmed by the Court of Appeal, on appeal. Thus the present appeal would proceed on the basis that the previous decision ie the trial judge's decision was correct (see paras 13–14 & 18–20).

(2) **(per Zaleha Yusof JCA, majority)** Although the appellants claimed that they were innocent partners and not involved in the fraud committed by Frankie Tan, under the provisions of the Partnership Act 1961 ('the Act') any action done, wrongful or otherwise, by any partners would bind the firm and all the other partners. The provisions of ss 7, 8, 12 and 14 of the Act were very clear on this point. Thus, as decided correctly by the trial judge in the main suit, the appellants were liable jointly and severally with Frankie Tan and also their firm. Further, the Act was a specific Act relating to partnership, which would prevail over any other law on this issue of partners' liability. As such, the provisions of the Rules of Court 2012 could not override the Partnership Act 1961 (see paras 21–23).

(3) **(per Mary Lim JCA, dissenting)** The grounds raised by the appellants go towards disputing liability and for a dismissal of the leave sought, and O 77 r 5(4) of the ROC specifically provides that the court was vested with discretion as to whether to grant leave or otherwise and as to the consequential directions or orders that should be required where liability was disputed. In considering its exercise of discretion as to whether to grant leave, the court should consider whether those issues were genuine or real. The court only needed to consider them at a prima facie level, to see if those issues warranted any trial or determination. Order 77 r 5(4) offers a right of challenge where enforcement was sought against the person of the partner and not against the assets or property of the firm. It was not reasonable to say that because the appellants represented the firm in the proceedings that led to the judgment, that they were prohibited from disputing the respondent's application for leave. It was not for the respondent to now deny the appellants their fundamental right of challenge embedded in O 77 r 5(4) and (5) of the ROC 2012. Thus, the appellants should be given leave to defend their liability (see paras 52–59).

[Bahasa Malaysia summary

Perayu-perayu adalah rakan kongsi firma undang-undang Tetuan Paul Cheah & Assoc ('firma'), sementara responden adalah anak guam firma tersebut. Responden telah memberikan kemudahan pinjaman kepada syarikat yang dikenali sebagai Polyidaman Sdn Bhd ('Polyidaman') dan telah melantik firma

tersebut untuk menjadi peguamcaranya bagi menyediakan dokumen jaminan pinjaman bagi pinjaman tersebut. Sebagai jaminan untuk pinjaman tersebut, Polyidaman telah dengan wajar melaksanakan caj di bawah Kanun Tanah Negara terhadap hartanahnya memihak responden. Apabila Polyidaman mengingkari bayaran balik pinjamannya responden memulakan prosiding undang-undang terhadapnya. Ia adalah pada poin ini, bahawa responden mendapati bahawa caj hartanah telah dilepaskan tanpa pengetahuannya. Carian menunjukkan bahawa hartanah telah dipindahkan kepada pihak ketiga dan bahawa harta yang sama sekarang ini dicaj kepada CIMB Bank Bhd sebagai jaminan untuk pinjaman pihak ketiga. Ia juga didapati bahawa dokumen pelepasan mengandungi tandatangan palsu salah seorang pegawai-pegawai responden dan disaksikan oleh seorang bernama Frankie Tan Lyn Seang (Frankie Tan), yang mana adalah rakan kongsi firma tersebut. Oleh itu, responden telah memulakan tindakan untuk menuntut ganti rugi disebabkan oleh kecuaian firma, fraud dan pelanggaran kontrak dan kewajipan berhati-hati. Selepas perbicaraan penuh, Mahkamah Tinggi mengawardkan penghakiman memihak responden. Rayuan firma tersebut ditolak oleh Mahkamah Rayuan. Kemudiannya, responden memfailkan permohonan di bawah A 77 k 5(4) Kaedah-Kaedah Mahkamah 2012 ('KKM') ('permohonan') untuk melaksanakan penghakiman secara peribadi terhadap kesemua keempat-empat rakan kongsi firma tersebut dan bukan firma tersebut. Permohonan dibenarkan oleh Mahkamah Tinggi. Maka, rayuan ini oleh perayu-perayu atau dua daripada rakan kongsi firma tersebut. Dalam rayuan ini perayu-perayu hanya bergantung ke atas satu isu iaitu A 77 k 5(5) KKM. Ia adalah hujahan perayu-perayu bahawa dalam kes-kes di mana rakan kongsi, seperti mereka, jelas mempertikaikan liabiliti mereka hakim perbicaraan sepatutnya memerintahkan isu liabiliti dibicarakan dan ditentukan sebelum memberikan izin untuk melaksanakan. Perayu-perayu selanjutnya berhujah bahawa kaedah ini sepatutnya diguna pakai terutamanya kepada kes ini di mana dalam tindakan utama hanya firma tersebut disaman dan bukan rakan kongsi. Dalam menjawab, responden berhujah bahawa ia memohon untuk melaksanakan terhadap keempat-empat rakan kongsi firma tersebut kerana firma tersebut telah tamat operasi. Responden juga mendakwa untuk bergantung atas pengesahannya dengan Majlis Peguam dalam memulakan permohonan untuk izin melaksanakan terhadap perayu-perayu. Pembelaan perayu-perayu adalah bahawa mereka tidak mempunyai pengetahuan dan tanggungjawab undang-undang untuk perlepasan tersebut dan tindakan jenayah dan fraud Frankie Tan. Perayu-perayu selanjutnya merujuk kepada prosiding bahawa firma telah memulakan terhadap syarikat insuransnya untuk memberikan perlindungan kepada firma tersebut berkaitan kepada perkara-perkara yang diadukan oleh responden. Ia adalah juga hujahan perayu-perayu bahawa walaupun firma adalah bertanggungjawab dan bahawa tindakan rakan kongsi akan mengikat firma tersebut dan mengikat setiap rakan kongsi, pelaksanaan hanya berkenaan aset-aset firma tersebut, dan bukan rakan kongsi secara peribadi. Perayu-perayu selanjutnya berhujah bahawa A 77

k 5(4) KKM memerlukan rakan kongsi yang sama keadaan untuk diberikan izin untuk membela bahawa isu liabiliti peribadi sebelum pelaksanaan boleh dijalankan dan bahawa hakim perbicaraan telah tersilap dari segi undang-undang dan atas fakta. Asas hujahan responden adalah bahawa liabiliti perayu-perayu sebagai perayu-perayu firma tersebut pada masa material telah jelas dibuktikan di bawah Akta Perkongsian 1961. Selanjutnya, responden membantah terhadap perayu-perayu membangkitkan isu A 77 k 5(5) KKM ini kerana ia adalah isu baru dan tidak pernah dibangkitkan di hadapan Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos sebanyak RM4,000 untuk dibayar oleh setiap perayu:

(1) **(oleh Zaleha Yusof HMR, majoriti)** Setelah meneliti rekod rayuan ia didapati bahawa adalah betul bahawa isu A 77 k 5(5) KKM tidak pernah dibangkitkan di Mahkamah Tinggi. Isu bahawa liabiliti perayu-perayu perlu dibicarakan sebelum izin untuk melaksanakan penghakiman yang diberikan, juga tidak dibangkitan di dalam afidavit-afidavit perayu-perayu untuk membantah permohonan juga tidak di dalam penghujahan mereka. Isu ini bahawa hakim Mahkamah Tinggi telah tersilap kerana gagal untuk menilai peruntukan A 77 k 5(5) hanya dibangkitkan bagi kali pertama di dalam memorandum rayuan perayu-perayu. Walau bagaimanapun, jika isu tersebut tidak pernah dibangkitkan atau dihujahkan di hadapan hakim Mahkamah Tinggi, bagaimana beliau dikatakan telah tersilap. Ia adalah undang-undang nyata bahawa seperti pliding, pernyataan yang dibuat oleh pihak dalam afidavitnya patut mengikatnya. Oleh itu, walaupun perayu-perayu telah sekarang ini bangkitkan isu ini dalam memorandum rayuan mereka, ia adalah undang-undnag yang ditetapkan bahawa isu ini tidak boleh dan tidak patut dibenarkan kerana ia telah melampaui afidavit-afidavit mereka, yang mana mereka terikat. Walau bagaimanapun, liabiliti perayu-perayu sebagai rakan kongsi defendan defendant sebenarnya telah dibangkitkan dan diputuskan oleh hakim perbicaraan di dalam tindakan utama dan hakim perbicaraan di dalam tindakan utama telah memeutuskan bahawa firma tersebut bertanggungjawab dan bahawa kesemua rakan kongsi firma tersebut, yang mana sememangnya termasuk perayu-perayu, juga adalah bertanggungjawab secara bersama. Keputusan ini juga telah disahkan oleh Mahkamah Rayuan, atas rayuan. Oleh itu, rayuan ini akan diteruskan atas asas bahawa keputusan sebelumnya iaitu keputusan hakim perbicaraan adalah betul (lihat perenggan 13–14 & 18–20).

(2) **(oleh Zaleha Yusof HMR, majoriti)** Walaupun perayu-perayu mendakwa yang mereka adalah rakan kongsi tidak bersalah dan tidak terlibat di dalam fraud yang dilakukan oleh Frankie Tan, di bawah peruntukan Akta Perkongsian 1961 ('Akta') apa-apa tindakan dilakukan,

salah atau sebaliknya, oleh mana-mana rakan kongsi akan mengikat firma tersebut dan kesemua rakan kongsi yang lain. Peruntukan ss 7, 8, 12 dan 14 Akta adalah jelas atas poin ini. Oleh itu, seperti yang diputuskan secara betul oleh hakim perbicaraan dalam tindakan utama, perayu-perayu adalah bertanggungjawab secara bersesama dan berasingan dengan Frankie Tan dan juga firma mereka. Selanjutnya, Akta adalah Akta spesifik berkaitan perkongsian, yang mana akan mengatasi mana-mana undang-undang lain atas isu liabiliti rakan kongsi ini. Dengan itu, peruntukan Kaedah-Kaedah Mahkamah 2012 tidak dapat mengatasi Akta Perkongsian 1961 (lihat perenggan 21–23).

(3) **(oleh Mary Lim HMR, menentang)** Alasan-alasan yang dibangkitkan oleh perayu-perayu terhadap mempertikaikan liabiliti dan untuk penolakan izin yang dipohon, dan A 77 r 5 KKM secara spesifik memperuntukkan bahawa mahkamah diletakhak dengan budi bicara sama ada untuk memberikan izin atau sebaliknya dan mengenai arahan-arahan berbangkit atau perintah-perintah yang patut diplikan di mana liabiliti dipertikaikan. Dalam mempertimbangkan pelaksanaan budi bicaranya terhadap sama ada untuk memberikan izin, mahkamah patut mempertimbangkan sama ada isu-isu tersebut adalah tulen dan benar. Mahkamah hanya perlu untuk mempertimbangkannya di peringkat prima facie, untuk melihat jika isu-isu tersebut mewajarkan apa-apa perbicaraan atau penentuan. Aturan 77 k 5(4) menawarkan hak untuk mencabar di mana penguatkuasaan dipohon terhadap orang rakan kongsi dan bukan terhadap aset atau hartanah firma tersebut. Ia adalah tidak munasabah untuk menyatakan bahawa kerana perayu-perayu mewakili firma tersebut di dalam prosiding yang membawa kepada penghakiman tersebut, ia adalah dilarang daripada mempertikaikan permohonan responden untuk izin. Ia bukan untuk responden sekarang untuk menafikan perayu-perayu hak cabaran asas mereka terletak di dalam A 77 k 5(4) dan (5) KKM. Oleh itu, perayu-perayu patut diberikan izin untuk membela liabiliti mereka (lihat perenggan 52–59).]

Notes

Cases referred to

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (folld)

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)

Kumpolan Kemajuan Raya Sdn Bhd v Faidz Darus [1996] 5 MLJ 35, HC (refd)

Public Bank Berhad v Paul Cheah & Associates (Frankie Tan Lyn Seang, third party) [2012] MLJU 1591; [2012] 1 LNS 831, HC (refd)

S Mariappan v Government of Malaysia [1983] 2 MLJ 340, FC (refd)

Union of India v Manohar Lal Narang and another; Union of India v Omi Prakash Narang and another [1977] 2 All ER 348, QBD (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 23
Limitation Act 1953 s 32
National Land Code Form 16N
Partnership Act 1961 ss 7, 8, 12, 14
Rules of Court 2012 O 77, O 77 rr 1, 4, 5, 5(1), (3), (4), (5), 6, 6(2)
Rules of the High Court 1980 O 77 r 5(5)
Subordinate Courts Rules 1980 O 10 r 5(5)

Appeal from: Suit No D-NCC-165 of 2011 (High Court, Kuala Lumpur)

Low Weng Tchung (Weng & Co) for the appellants.
Goh Meng Yew (Farida Zohra bt Khalir with him) (Rama Iza Ng Yeoh & Kit) for the respondent.

Zaleha Yusof JCA (delivering majority judgment of the court):

[1] The respondent in this appeal was the plaintiff in the main suit before the High Court. The defendant in the main suit was a legal firm known as Paul Cheah & Assoc ('the said firm').

[2] The appellants in this appeal were partners of the said firm.

[3] The respondent had appointed the said firm to be their solicitor to prepare the loan security documentation for a loan to one Polyidaman Sdn Bhd ('Polyidaman'). As a security for the loan, Polyidaman had duly executed a charge under the National Land Code over its property in favour of the respondent.

[4] However, when Polyidaman defaulted on its loan, the respondent discovered that the charge had been discharged and the property had been transferred to a third person and that the same property was now charged to CIMB Bank Bhd as a security for that third person's loan. It was also discovered that the discharge document contained a forged signature of one of the respondent's officers and witnessed by one Frankie Tan Lyn Seang ('Frankie Tan') who was a partner of the defendant.

[5] To cut the story short, the respondent had commenced the main suit to claim for the damages caused by the defendant's negligence, fraud and breach of contract and duty of care. After a full trial, the High Court had on 30 November 2012 awarded judgment in favour of the respondent. The decision of the High Court was affirmed, on appeal by the defendant, by the Court of Appeal on 5 August 2013.

[6] It was the respondent's contention that it only received the sealed judgment dated 30 November 2012 on 20 February 2014. On 10 March 2014, it received notification from the Bar Council that the defendant had ceased operation and that there were four partners of the defendant at the date of the discharge of the charge ie on 1 November 2006. A B

[7] The respondent had filed an application under O 77 r 5(4) of the Rules of Court 2012 encl (71) to execute the judgment against all these four partners; and the application was allowed by the High Court on 26 August 2015. Hence, the appeal before us by two of the partners, the appellants in this appeal. C

[8] Having perused the record of appeal and considered the submissions made by learned counsel for the respective parties, by a majority decision, this appeal was dismissed with cost and the decision of the High Court was affirmed. We shall now give our reasons for dismissing the appeal. D

OUR GROUNDS

[9] Before us, learned counsel for the appellants only relied on one issue ie O 77 r 5(5) of the Rules of Court 2012. It was his argument that where the partners like the appellants in this appeal had clearly disputed their liability; what the learned judge should have done was to order the issue of liability to be first tried and determined before granting any leave to execute. Especially so in this case where in the main suit only the firm was sued and not the partners. He relied on a High Court case of *Kumpolan Kemajuan Raya Sdn Bhd v Faidz Darus* [1996] 5 MLJ 35 wherein it was, inter alia, held that the judgment taken against the firm though final on the record, was open to challenge on an application for leave to execute against the partners because pursuant to O 10 r 5(5) of the Subordinate Courts Rules 1980, (which was similar to O 77 r 5(5) of the Rules of the High Court 1980) the individual partner had a right to challenge the liability. If he did, according to that case, the court might order that his liability be tried and determined before such leave could be granted. E F G

[10] Learned counsel for the appellants further argued that as the personal liberties of the appellants were at stake due to the intention of the respondent to execute the judgment by way of bankruptcy proceeding against the appellants, the word 'may' as found in O 77 r 5(5) ought to be interpreted to mean 'shall'. He referred to the House of Lord's decision in *Union of India v Manohar Lal Narang and another; Union of India v Omi Prakash Narang and another* [1977] 2 All ER 348 to support his contention. H I

[11] On the other hand, learned counsel for the respondent objected to the appellants raising this issue of O 77 r 5(5) as this was a new issue and never raised before the learned High Court. Since this was now the sole ground of

appeal before this court, he urged this court to dismiss this appeal. He found support in the Federal Court's decision in *S Mariappan v Government of Malaysia* [1983] 2 MLJ 340 wherein Abdul Hamid FJ (as His Lordship then was), delivering the judgment of the court had stated as follows:

> ... As a starting point we refer to a passage in *Mallal's Supreme Court Practice* at p 917 under the heading 'Points not taken in Court below'. The principle that emerges from the authorities, fundamentally, is that the Court of Appeal will not consider an issue which has not been raised before, particularly on a point not argued in the court below and which did not appear specifically in the pleadings ...

[12] In any event, learned counsel for the respondent further submitted that the liability of the appellants as partners of the defendant had in fact been raised and decided by the learned trial judge in the main suit. The learned trial judge had already ruled that the other partners of the defendant were liable for the wrongful action of Frankie Tan and that the appellants were jointly liable for the loss and damage suffered by the respondent.

[13] We had perused the record of appeal which was contained in only one bundle, and found that it was true that the issue of O 77 r 5(5) was never raised in the High Court. Nowhere in their affidavits to oppose the application did the appellants raise the issue that their liability should be tried first before leave to execute the judgment was granted. Neither was it argued in their respective submission. However we noted that in their memorandum of appeal, the appellants did raise the issue as follows:

> *The learned judge erred in law in failing to appreciate* that as the Appellants had disputed their liability under the judgment dated 30.11.2012, the learned judge ought to have ordered that the liability of the Appellants first be tried and determined pursuant to Order 77 Rule 5(5) of the Rules of Court 2012.

[14] Now the appellants contended that the learned High Court judge erred in failing to appreciate the provision of O 77 r 5(5). But if it was never raised and never argued before her, how could she be said to have erred?

[15] The Federal Court had recently in *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 held, inter alia, as follows:

> (1) While it is true that the Court of Appeal could consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994, this was subject to the overriding discretion of the court to do justice. Where the justice of the case required a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court could allow a new point to be argued. However, in so doing, it was not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for

A

> the parties as it was also trite that parties in litigation were bound by the four corners of their pleadings ...

B

[16] Like pleadings, whatever assertion made by a party in his affidavit, shall bind him. In his affidavit to oppose encl (71), the first appellant merely raised the issue of delay by the respondent in filing encl (71), that he was not liable as a partner because the fraud committed by Frankie Tan was a criminal act and not an act relating to the business of the kind carried on by the defendant, and that there was in existence a settlement agreement between the defendant and Pacific & Orient Insurance Co Bhd as a result of which the defendant had withdrawn the third party proceedings against Pacific & Orient Insurance Co Bhd; and that it was premature for the respondent to enforce the judgment against the partners of the defendant as the defendant was still operational.

C

D

[17] On the part of the second appellant, except on issue of delay, his affidavit to oppose encl (71) also contained the same averment.

E

[18] Therefore we agreed with the respondent that the appellant had never averred or sought for the court to determine their liabilities first before allowing encl (71). And as mentioned earlier, they had never brought this issue up at the submission stage before the High Court too. Therefore, although the appellants had now raised the issue in their memorandum of appeal, following the Federal Court in *Dato' Tan Chin Woh* we could not and should not allow it as it had gone beyond the four corners of their affidavits, which like pleadings, they were bound to.

F

G

[19] In any event we had read the decision of Justice Mah Weng Kwai (as he then was) who heard the main suit which could be found in the respondent's bundle of authority, *Public Bank Berhad v Paul Cheah & Associates (Frankie Tan Lyn Seang, third party)* [2012] MLJU 1591; [2012] 1 LNS 831. One of the issues dealt with by the learned judge was whether the defendant could be sued as a firm. He answered the issue, inter alia, as follows:

> In view of the findings of facts made above, the court is of the view that the defendant must be held accountable for the loan suffered by the plaintiff.
>
> The defendant in particular Frankie Tan, knowing that the plaintiff's loan to Polyidaman was still outstanding and that the redemption sum had not been paid had no reason whatsoever to witness the forged signature of Khoo So Yin on Form 16N to discharge the plaintiff's charge. Due to the fraudulent discharge of plaintiff's charge, the transfer of the property to Shahrol and the wrongful registration of CIMB's charge, the plaintiff has lost its security for the loan to Polyidaman. All these events took place due to the fraudulent conduct of Frankie Tan and his breaches of the duty of care and contract owed to the plaintiff. The complicity of Frankie Tan in this criminal venture is evident. Without redeeming the property, Frankie Tan managed to secure a loan of RM800,000 from CIMB.

H

I

A The money was disbursed into the HSBC account operated by the defendant at its head office where presumably it remains till today.

All the partners of the defendant in the head office as well as in the Subang Jaya Branch are jointly liable for the loss and damages suffered by the plaintiff due to the fraudulent acts, negligence and breaches of contract committed by Frankie Tan. In
B the law of partnership there is no distinction between the branches and the head office in so far as liability is concerned. The conveyancing practice of the Subang Jaya branch was the ordinary business of the firm. The fact that Frankie Tan had carried out the transactions in respect of the property in a fraudulent manner does not exempt the firm from being liable under s 12 of the Partnership Act 1961. The
C fact that the transactions were carried out through illegal means is irrelevant to the determination that the transactions were within the ordinary course of business of the defendant. A partner who is ignorant of the offence committed by his partner is still liable for the same offence as a partner (see *Clode v Barnes* [1974] All ER 1166). And in *Alan Michael Rozario v Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 it was held
D that although the second defendant was 'not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter did not absolve him in law under Partnership Act 1961, of his liability as a partner of the firm at the material time. The second defendant's obligation and liability to the plaintiff under the letter of undertaking was pursuant to his being a partner of the firm and not his knowledge or express authorisation of it').

E

[20] Based on the above, we could not but agree with learned counsel for the respondent that the liability of the appellants as partners of the defendant had in fact been raised and decided by the trial judge in the main suit. The learned trial judge in the main suit had held that the defendant was liable and that all
F partners of the defendant which would of course include the appellant, were also jointly liable. This decision had been affirmed by the Court of Appeal, on appeal. The result of this is that we must proceed with this appeal on the basis that the previous decision ie the trial judge's decisions, was correct. Once the court had decided on a particular matter or issue, the matter or issue is binding
G on it at a later stage in the same suit or in a subsequent suit. See *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74.

[21] We were of the view that the fact that the appellants claimed that they were innocent partners and not involved in the fraud committed by Frankie
H Tan could not divert them of their responsibility in law under the Partnership Act 1961 as revised on 1 July 1974 (Act 135). The provisions of ss 7, 8, 12 and 14 of Act 135 are very clear on this point. They are as follows:

7 Every partner is an agent of the firm and his other partners for the purpose of the
I business of the partnership; and *the acts of every partner who does any act for carrying on in the usual was business of the kind carried on by the firm of which he is a member bind the firm and his partners*, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

8 *An act or instrument relating to the business of the firm and done or executed in the firm-name*, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, *is binding on the firm and all the partners*.

12 *Where, by any wrongful act* or omission *of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners*, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

14 *Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable* under section 12 or 13.

[22] Those provisions show that any action done wrongful or otherwise by any partners shall bind the firm and all the other partners. Those provisions especially ss 12 and 14 make the appellants herein, as decided correctly by the trial judge in the main suit, liable jointly and severally with Frankie Tan and also their firm, the defendant in the main suit.

[23] We also bore in mind that Act 135 is a specific Act relating to partnership. Hence it prevails over any other law on this issue of partners' liability. We were of the view that the provisions of Rules of Court 2012 could not override Act 135. See s 23 of the Interpretation Acts 1948 and 1967 (Act 388).

CONCLUSION

[24] For the reasons above stated, we did not find any merit in this appeal. We therefore affirmed the decision of the High Court and dismissed this appeal with cost of RM4,000 to be paid by each appellant to the respondent subject to payment of allocatur. We also ordered the deposit to be refunded.

Mary Lim JCA (delivering dissenting judgment of the court):

[25] The two appellants were once partners of the legal firm of Messrs Paul Cheah & Assoc ('the firm'). The respondent was a client of the firm. The respondent successfully sued the firm and judgment for the sum of RM561,483.62 together with interest thereon and costs of RM207,335 ('the judgment') was entered after trial on 20 November 2012. The firm's appeal was dismissed by the Court of Appeal on 5 August 2013.

[26] The respondent sought leave to execute the judgment against the appellants and two other partners of the firm under O 77 r 5(4) of the Rules of Court 2012. The respondent was seeking to initiate bankruptcy proceedings against them. The appellants and one other partner objected and filed affidavits in opposition. Despite their objections, leave was granted by the learned High

Court judge. Two of the three partners who objected, appealed.

[27] No grounds were available at the time of the hearing of the appeal. However, given that it is an appeal against an interlocutory order, we decided to proceed sans grounds. Upon hearing all counsel, this court, by majority dismissed the appeal. This is my dissenting decision.

[28] These are the relevant facts. The respondent appointed the firm to be its solicitors vide letter of appointment dated 3 December 2003. The firm was required to prepare loan security documentation for a RM750,000 loan that the respondent was providing to a company known as Subang Aquatic Services Sdn Bhd (previously known as 'Polyidaman Sdn Bhd') towards the construction of its factory premises. Subang Aquatic Services Sdn Bhd executed a charge in favor of the respondent over the property upon which the factory was built. When Subang Aquatic Services Sdn Bhd defaulted in the loan repayments, the respondent decided to initiate foreclosure proceedings. It appointed a real estate valuer to value the property in question.

[29] It was at that point, that the respondent learnt that the property had been discharged without its knowledge. Upon discharge, the property was transferred to one Shahrol @ Sahrol bin Mat Sum ('Shahrol') and the property was charged to CIMB Bank Bhd pursuant to a loan that CIMB Bank Bhd had granted to Shahrol on 1 November 2006. It appeared that the firm had been appointed by CIMB Bank Bhd as its solicitors to perfect loan security documentation in respect of a loan to Shahrol. A Form 16N discharging the respondent's charge was purportedly signed by one of the respondent's officers, Khoo So Yin and witnessed by Frankie Tan Lye Seang, a partner of the firm at the material time. That signed Form 16N was subsequently presented to the land office for registration by the firm. The respondent claimed that Khoo So Yin's signature was forged.

[30] The respondent sued the firm claiming damages caused by the firm's negligence, fraud, breach of the letter of appointment, solicitor guidelines, retainer and/or breach of duty of care. The firm defended the claim. After a full trial, judgment was entered in favour of the respondent. The High Court's decision was affirmed by the Court of Appeal on 5 August 2013.

[31] The present appeal relates to actions taken by the respondent towards executing that judgment against not the firm, but the partners of the firm.

APPLICATION FOR LEAVE UNDER O 77 R 5(4) OF THE RULES OF COURT 2012

[32] According to the application filed by the respondent, leave pursuant to O 77 r 5(4) of the Rules of Court 2012 was sought to execute personally against four named partners of the firm by way of bankruptcy proceedings, namely:

(a) Sulaiman bin Mohd Said, the second appellant;

(b) Lee Choon Hei;

(c) Venu Nair, the first appellant; and

(d) Tan Lye Seang, Frankie.

[33] In its application, the respondent claimed that the judgment of 30 November 2012 was only sealed by the court on 20 February 2014; and that it was seeking to execute against the four partners of the firm as the firm had ceased operations since 10 March 2014. The respondent relied on its verification with the Bar Council in commencing the application for leave to execute against the appellants.

[34] Insofar as the present appellants are concerned, although they filed separate affidavits in opposition to the application, their grounds of objection were substantially the same. One other partner, Lee Choon Hei had also opposed the application but he has not appealed. His papers are therefore not before us.

[35] In essence, the appellants denied knowledge of and legal responsibility for the discharge and the criminal and fraudulent acts of Frankie Tan Lye Seang and one Chow Kah Wai, a legal assistant of the firm; denied that these persons had authorisation to act or that these acts were acts conducted in the ordinary course of the business of the firm; that they were not personally liable as they were not partners of the firm at Subang since they operated out of the firm's branch in the city, Kuala Lumpur and at the Taman Gembira branch in Klang. The appellants further alluded to proceedings that the firm had initiated against its insurers, Pacific & Orient Insurance Bhd; that agreement was reached between the firm and the insurers in that the insurers had agreed to provide cover to the firm in relation to the matters complained of by the respondent.

[36] The appellants further alleged that contrary to the respondent's contentions, the firm was still in operation. It was therefore, not fair for the respondent to rely on the status of the firm as at 10 March 2014. The appellants further contended that the enforcement of the judgment was barred by laches under s 32 of the Limitation Act 1953. In his submissions before us, learned

counsel for the appellants explained that the sum effect of these grounds was that the appellants' personal liability was still an open issue. While the firm was liable and that the acts of the partners bind the firm and bind each partner, execution was only in respect of the firm's assets, and not the partners personally. To do that, the personal liability of the partner had to be established and this was never done. O 77 r 5(4) required that partners who are similarly circumstanced ought to be given leave to defend that issue of personal liability before execution may be pursued. It was the appellants' submission that the exercise of discretion by the learned High Court judge was erroneous in law and on the facts.

[37] The respondent disagreed. Its basic argument is that the liability of the appellants as partners of the firm at the material time has already been clearly established. The respondent relies substantially on the provisions of the Partnership Act 1961 for that purpose. Learned counsel for the respondent submitted that under ss 7 and 8 of the Partnership Act 1961 (Act 135), 'every partner is an agent of the firm and his other partners for the purpose of the business of the partnership'. Section 7 further provides that 'the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular manner, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner'. Since the appellants were, undeniably, partners of the firm at the material time of the event complained of, that is the wrongful discharge of the property, the judgment could be executed against the appellants personally.

[38] Section 8 is said to further fortify the respondent's contention in that it provides that an 'instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners ...' Frankie Tan Lye Seang's witnessing of the signature on the relevant Form 16N on 19 November 2006, albeit forged, fell within the type of acts done by the partner and the firm that was in the course of the firm's business in the usual way. In short, it was the ordinary business of a form for a lawyer to witness documents and to present Form 16N for registration at the land office.

[39] Learned counsel for the respondent further submitted that ss 12 and 14 provide that any wrongful action done by any partner in the ordinary course of business of the firm binds the firm and the partners, jointly and severally. According to the respondent, since the judgment procured against the firm has not been paid by the firm, it is 'now time to execute that judgment against the partners' of the firm at the relevant time. Towards that end and for that reason,

leave was sought under O 77.

[40] It would appear that the learned High Court judge was not persuaded by these arguments as leave to execute personally against the appellants was granted.

[41] At the hearing of this appeal, the respondent contended that the appellants were not at liberty to raise this new ground, that the issue of their liability needed to be tried first before leave to execute may be considered. Since this was not one of the original grounds before the learned High Court judge, this court should not allow submissions on this point at this stage of the appeal. It was not open to the appellants to raise this complaint for the first time before us and that the principle of res judicata applied to estop the appellants from re-litigating the issue.

[42] With respect, I find this argument without merit. On the contrary, the respondent's counter argument puts paid to this complaint. The respondent submitted that this issue of the appellants' liability for the acts of the errant partner had already been dealt with by Justice Mah, the trial judge in the case which led to the judgment. Justice Mah, in essence found that the fact that the transactions were carried out through illegal means is irrelevant to the determination that the transactions were within the ordinary course of business of the defendant. A partner who is ignorant of the offence committed by his partner is still liable for the same offence as a partner. The trial court found the partners liable for the wrongful actions of Frankie Tan even if they had no knowledge or had not authorised the actions.

[43] It is necessary to scrutinise the respondent's application. It was specifically for leave to enforce the judgment through bankruptcy proceedings against four of five partners. There was no action against one Lim Choon Wee as he had passed away on 31 October 2012.

[44] As for the remaining partners, three of the four partners objected to the application with their reasons reflected in the affidavits filed. The other partner, the erstwhile Frankie Tan Lye Seang did nothing. On this score alone, there should have been a careful examination of the different bases adopted by the persons or partners responding to the application. Clearly, there is no distinction drawn between the four partners as leave was granted in respect of all four partners. This lack of distinction gives some foothold to the allegation that there was an improper exercise of discretion under O 77, in particular r 5(4).

[45] Evidently, O 77 r 5 applies as the respondent's application itself seeks to move the court under that specific rule. The respondent acknowledged that the

A appellants and that would extend to all the other partners were never sued in the action which led to the judgment. It was the firm that was sued even though it was open to the respondent to sue both the partners, and that would extend to each and every one of them, in the same proceedings taken against the firm. That is entirely permissible under the Partnership Act 1961 as well as under
B O 77 of the Rules of Court 2012. Order 77 r 1 clearly provides for this course of conduct:

> 1 Action by and against firms within jurisdiction
>
> Subject to the provisions of any written law, any two or more persons claiming to be
C entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued, in the name of the firm, if any of which they were partners at the time when the cause of action accrued.

D **[46]** Order 77 of the Rules of Court 2012 contain specific rules on actions against and by partners and their firms. These procedural rules provide that claimants are at liberty to sue the partnership as a firm or the several partners of the firm. Where the partners are sued as partners in the name of their firm, or where the writ is served personally on the partners, these affected partners are
E obliged to enter appearances in their own names and not that of the firm — see r 4.

[47] When judgment is secured against a firm, execution to enforce the
F judgment is against any property of the firm. This is expressed in r 5(1):

> (1) Where a judgment is given or an order is made against a firm, execution to enforce the judgment or order may, subject to rule 6, issue against any property of the firm within the jurisdiction.

G **[48]** Rule 6 deals with execution to enforce a judgment or order given or made in actions by or against a firm in the name of the firm, against or by a member of the firm; or actions by a firm in the name of the firm against a firm in the name of the firm where those firms have one or more members in common. In such instances, leave of the court is required. Order 77 r 6(2)
H provides that in hearing these applications, the court may give such directions as may be just including directions as to the taking of accounts. This rule does not apply to the present factual scenario as the respondent is not a firm which had initiated the action against a member of the firm.

I **[49]** Be that as it may and because the respondent says that the firm has since ceased operations, and because the respondent never cited or sued the partners personally, it now wants to enforce the judgment against the partners personally. For that purpose too, there is clear provision under the Rules of Court 2012 as to the respondent's next course of conduct. O 77 r 5(4) provides:

5 Enforcing judgment or order against the firm

(4) Where a party who has obtained a judgment or an order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by notice of application which must be served personally on that person.

[50] The respondent's application is in reliance on r 5(4). However, r 5(4) must be read with r 5(5) which provides:

(5) Where the person against whom an application under paragraph (4) is made does not dispute his liability, the Court hearing the application may, subject to paragraph (3), give leave to issue execution against the person and, where that person disputes his liability, the Court may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[51] Evidently, r 5(5) provides for what happens when there is dispute on liability and where there is none. Where liability is not disputed, the court may give leave to issue execution. This is however, subject to para (3) which deals with the concerns of whether the partner in question is or is not within jurisdiction at the material time when the writ was issued. This position is not relevant on the present facts save in relation to the two partners who did not dispute the application.

[52] What is relevant in this appeal is the case of the two appellants who disputed liability. Rule 5(4) provides specifically that where the partner disputes his liability, 'the Court may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined'. I am fully aware that the court is vested with discretion as to whether to grant leave or otherwise and as to the consequential directions or orders that may be required where liability is disputed. But given that the whole object behind the issue of leave, and this is also apparent from r 6, is the matter of what is 'just', real and meaningful effect must be given to the exercise of this discretion. It certainly cannot mean that the judge hearing the application embarks on an exercise to consider let alone determine the merits of the dispute.

[53] In considering its exercise of discretion as to whether to grant leave and order the issue of personal liability of the appellants be tried and determined in any manner, the court should consider whether those issues are genuine or real. The court only needs to consider them at a prima facie level, to see if these issues warrant any trial or determination.

A **[54]** While the trial court may have said that 'all the partners of the defendant in the Head Office as well as in the Subang Jaya Branch are jointly liable' for the wrongful actions of Frankie Tan even if they had no knowledge or had not authorised the actions, that was so as to find the firm liable, regardless the actions of whichever the branch of the firm. Justice Mah had clearly opined B that in 'the law of partnership there is no distinction between the branches and the Head Office in so far as liability is concerned'. That, is still, a long way from finding several personal liability against the appellants. I must add that I view with concern that in relation to these appellants, a copy of the judgment of Justice Mah was also not before the court to at the very least, assist the court to C appreciate the meaning and effect of the judgment.

[55] The grounds raised by the appellants go towards disputing liability and for a dismissal of the leave sought. The appellants may not have clearly D articulated that they wanted leave to defend or to try and determine the issues they have raised, and the Rules should not be read any differently just because the appellants here are legally qualified, the learned High Court judge was obliged to exercise her discretion guided by the provisions of r 5(5). That subrule provides that the court 'may order that the liability of that person be E tried and determined in any manner in which any issue or question in an action may be tried and determined'. The issues, especially the matter of the operations or otherwise of the firm, which was the primary basis upon which the respondent initiated the application in the first place, are real issues for consideration of some arguable merit.

F

[56] Enforcement actions especially in the nature and form of bankruptcy proceedings have far reaching, sometimes unamendable consequences. Care and proper appreciation of the full facts must be undertaken. Where there is doubt, it should be in the favour of the party responding to the application G unless there is clear judgment against that party. Since the judgment is quite obviously against and in the name of the firm, and not the appellants, who though found accountable as a firm, have disputed their personal liability. That is certainly a valid concern which requires proper evaluation.

H **[57]** Looking at the chronology of events and the explanation for the intervals between one action and the next, it becomes patently clear that that too, warrants closer examination which appears not to have been carried out. An exercise of discretion given by law is very much influenced by facts and the conduct of the parties. The sense of fair play and justice will always be I paramount and override technical concerns. In this case, the respondent had secured the judgment on 30 November 2012. The Court of Appeal had affirmed that judgment on 5 August 2013. Information on the operation of the firm and the partners was obtained from the Bar Council on 10 March 2014. Yet, the execution proceedings against the partners were only initiated seven

months later, on 24 October 2014. According to the respondent, a sealed copy of the judgment was only obtained on 20 February 2014. I find the chronology of these events and the account for the intervals meriting scrutiny.

[58] In my view, these issues especially the matter of whether the firm is still in operation, laches, and the matter of the insurance cover raised by the appellants together with the arguments on the application or otherwise of the principles of res judicata, are valid issues. These issues were not available and were not issues raised in the earlier trial. These bona fide issues have to be properly tried, argued and determined. The arguments may well culminate in the same verdict as that previously reached, but it is obvious that the stage of the application for leave is no place for such determination. Full and proper arguments should be accorded as that is the objective and intention behind r 5(4). Otherwise, r 5(4) will serve to offer mere window dressing.

[59] Rule 5(4) offers a right of challenge where enforcement is sought against the person of the partner and not against the assets or property of the firm. It is not reasonable to say that because the appellants, especially the first appellant represented the firm in the proceedings that led to the judgment, then he is prohibited from disputing the respondent's application for leave. In my judgment, attending and defending proceedings on behalf of the firm is quite different in more respects than one from when one appears to defend on one's own personal behalf. The implications are immediately and obviously different. The respondent made that choice to start with though it could have sued the appellants and the other partners personally. It did not. It chose not to. It is not for the respondent to now deny the appellants their fundamental right of challenge embedded in r 5(4) and (5).

[60] For all the above reasons, the appeal must be allowed. The appellants must be given leave to defend their liability. The case ought to be remitted to the High Court for case management and for further directions towards a trial and determination of that liability.

Appeal dismissed with costs of RM4,000 to be paid by each appellant.

Reported by Kohila Nesan